Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers	MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	MM Docket No. 01-317
Definition of Radio Markets	MM Docket No. 00-244

COMMENTS OF TRIBUNE COMPANY

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Summary

The Commission has the ability – and all the evidence it needs – to stick to its promise to complete its review of the newspaper broadcast cross-ownership rule ("Newspaper Rule" or "Rule")' by Spring 2003 and it should do so. Moreover, like the cable-broadcast rule, the Newspaper Rule should be addressed by the Commission separately from this omnibus rulemaking, and repealed, based on the extensive record that has been before the Commission for a long time. Retention of the Newspaper Rule harms the public because it denies access to superior news and public affairs programming that is the hallmark of existing local newspaper-broadcast combinations. Retention of the Newspaper Rule also violates the First Amendment because the government impermissibly prefers all other speakers over local newspaper publishers, a preference that cannot withstand constitutional scrutiny.

As a matter of law, the Newspaper Rule must be repealed under any analytical standard: (a) the Biennial Review standard articulated in Section 202(h) of the Telecommunications Act of 1996, which requires the Commission to repeal any ownership rule no longer "necessary in the public interest"; (b) the Constitutional test of strict scrutiny applicable in this case because of the content-based nature of the regulation; (c) intermediate scrutiny, as articulated by the Supreme Court in *U.S. v. O'Brien*,[2] applied to rules determined to be content-neutral; or even, (d) a "rational basis" review applied to certain agency actions.

As a matter of policy, the Newspaper Rule should be eliminated in its entirety and not replaced with another cross-ownership limit involving newspapers. The "hoped for" gain in

[1] 47 C.F.R. § 73.3555(d) (2001).
[2] 391 U.S. 367 (1968) ("*O'Brien*")

viewpoint diversity that was the theoretical basis for the Rule has not been demonstrated – in fact, the public has been harmed by the Newspaper Rule. Studies and research demonstrate that television stations under common ownership with a local newspaper provide a greater quantity of news and public affairs programming and win more journalism awards than stations owned by other entities. The record shows that people choose among various media for news and information based on personal preferences unrelated to the media owner's identity or cross-ownership philosophy. Any effort to retain or reformulate the Newspaper Rule, under the Biennial Review Standard that is applicable here, would require a quantum of supporting evidence that is totally absent in the record before the Commission. Accordingly, any effort to fashion new limits on newspaper-broadcast ownership would fail to survive judicial review.

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COMMENTS OF TRIBUNE COMPANY

I. Introduction

The Newspaper Rule is a blanket prohibition on *any* common ownership of a daily newspaper and a radio *or* television station.[3] This regulatory straightjacket has never been reviewed by the Commission in more than a quarter century although several commissioners and legislators have called for repeal or relaxation in light of an intensely changing media landscape.[4]

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[3] *Supra*, note 1.

[4] *See e.g., 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 15 FCC Rcd 11058, 11154 (2000) ("*1998 Biennial Review Order*") (separate statement of Commissioner Powell, stating "I also must respectfully dissent from the majority's conclusion that the newspaper/broadcast cross-ownership rule continues to serve the public interest."); separate statement of Commissioner Ness; *see also* Remarks of Commissioner Rachelle Chong, NAB Radio Show, New Orleans, 1997 FCC Lexis 5138 (Sep. 19, 1997); *Stockholders of Renaissance Communications,* 12 FCC Rcd. 11866, 11894 (1997) (dissenting statement of Commissioner Quello, finding that the Rule is "out-dated, over-regulatory, and all too often flies in the face of common sense."); *Applications of Capital Cities/ABC, Inc. (Transferor) and the Walt Disney Company (Transferee) For Consent to the Transfer of Control of Licenses of Broadcast Stations,* 11 FCC Rcd 5841, 5851 (1996) (separate statement of Chairman Reed E.

In June 2002, the Chairman of the House Commerce Committee, Representative Billy Tauzin, and the Chairman of the House Subcommittee on Telecommunications, Representative Fred Upton, wrote to Chairman Powell expressing their disappointment with the Commission's decision to defer "what should be an immediate repeal of this outdated rule."[5]

The Commission's previous promises to complete a review of the Newspaper Rule have not been fulfilled.[6] In its 2002 ***Biennial Review*** *NPRM,* the Commission offered no justification for further inaction on the Newspaper Rule, simply asserting, "all of our local rules are predicated to some extent on assumptions about the types of media Americans rely on for news and current affairs. We are better able to analyze and apply our findings in areas such as these by considering the rules collectively rather than separately."' On this weak basis, the Commission decided to include the Newspaper Rule in this proceeding.

The Newspaper Rule has developed an extensive and substantial factual record for more than 25 years. As Tribune has demonstrated in its previous comments, attached hereto in Attachments **A** through D,[8] the record is replete with evidence showing the Newspaper Rule does not promote viewpoint diversity, its stated goal, and does not enhance the ability of viewers and readers to access "diverse and antagonistic sources."[9] The Newspaper Rule has caused and

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Hundt) ("The [Newspaper Rule] is right now impairing the future prospects of an important source of education and information: the newspaper industry.").

[5] Television Digest, July 1, 2002.

[6] ***Cross-Ownership of*** *Broadcast Stations* ***and Newspapers;*** *Newspaper/Radio* ***Cross-Ownership Waiver Policy,*** 16 FCC Rcd 17283 (2001) ***("'Newspaper-Broadcast NPRM").*** Comments were initially due December 3, 2001. The reply date was ultimately extended to February 15, 2002; *Newspaper/Radio* ***Cross-Ownership Waiver Policy,*** 11 FCC Rcd 13003 (1996) ***("Notice of Inquiry"***).

[7] ***See*** 2002 ***Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section*** 202 ***of the Telecommunications Act*** of *1996,* FCC 02-249, ¶ 8 (released September 23, 2002)(*"2002* ***Biennial Review NPRM").***

[8] "Tribune Reply Comments 2002" (Attachment A), "Tribune Comments 2001" (Attachment **B),** "Tribune Reply Comments 1998" (Attachment C), "Tribune Comments 1998" (Attachment D).

[9] ***Associated Press v. United States,*** 326 U.S. 1, 20 (1945); *see* ***also*** Einstein, Mara Program Diversity and

continues to cause irreparable harm to the public. The FCC Media Ownership Working Group Report by Thomas C. Spavins found that television stations owned by newspaper publishers provide a greater quantity of news and public affairs programming and win more awards than stations owned by other entities." This modem conclusion is wholly consistent with the Commission's conclusion at the time it adopted the Rule in 1975," marking a quarter-century of regulatory proscription denying the public higher-quality news and information through commonly-owned local newspapers and broadcast stations. The decades-old justification offered by the Commission for keeping this rule in full force will continue to harm the public as long as the Newspaper Rule remains in effect.[12]

II. Commission action on the Newspaper Rule should not be delayed until the omnibus rulemaking is ultimately decided.

The Newspaper Rule should not have been included in this omnibus proceeding because the record supporting repeal is complete based on public comments and replies in multiple proceedings.[13] Nothing in the studies released by the Commission's Media Ownership Working Group in 2002 provides any substantially new or different empirical information from that previously developed and produced in the record – and all this information supports repeal of the

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the Program Selection Process on Broadcast Network Television (FCC Media Ownership Working Group Report #5)(finding that diversity of programming source does not equate to diversity of programming).

[10] Spavins, Thomas C., et al., The Measurement of Local Television News and Public Affairs Programs (FCC Media Ownership Working Group Report #7).

[11] ***Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations,*** 50 FCC 2d 1046, 1078 (1975) ("[I]n connection with a number of entities, there is a long record of service to the public."); ***see id.*** at n.26 (There is "an undramatic but nonetheless statistically significant superiority in newspaper owned television stations in a number of program particulars.")

[12] ***Id.*** at 1081("[E]ven a small gain in diversity can be the basis for the requirement.").

[13] *See Newspaper-Broadcast* ***NPRM,*** 16 FCC Rcd 17283 (2001); ***Notice*** *of Inquiry*, 11 FCC Rcd 13003 (1996).

Newspaper Rule.[14] It is incumbent on the Commission to take action separately and expeditiously on the Newspaper Rule.

The Commission's decision to roll all of the national and local media ownership rules into one omnibus proceeding adversely affects newspaper owners and the public in every broadcast market in America.[15] As Commissioner Martin pointed out, "Contrary to claims [that] acting on this one rule would be unfair to other relevant industries, the Commission long ago gave an advantage to other licensees by relaxing their local ownership restrictions . . . [I]t is the newspaper industry that has been prejudiced by the Commission's failure to act on the 1998 and 2000 Biennial Review Reports' conclusions that this rule should be reviewed and likely modified."[16] Companies like Tribune that could benefit the public by participating more fully in the broadcasting business have been handicapped for 27 years and remain so with every passing month. The Court of Appeals for the District of Columbia Circuit vacated the cable-broadcast cross-ownership rule some months ago because, in part, it found retention of that rule while the Commission initiates and completes a rulemaking on remand "significantly harms" both the cable operators and broadcasters that might otherwise enter into certain transactions.[17] Similarly, newspaper owners and broadcasters are harmed while the Newspaper Rule remains in place.

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[14] ***See e.g.,*** Pritchard, David, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign (FCC Media Ownership Working Group Report #2).

[15] Newspaper-affiliated television stations broadcast seven hours more news and public affairs programming per week than non-affiliated stations; newspaper-owned television stations received two and three times the average number of awards when compared to other affiliates; viewer ratings were higher for newscasts on television stations affiliated with newspapers. *See* Spavins, Thomas C., et al., The Measurement of Local Television News and Public Affairs Programs; ***see also*** Tribune Comments 2001 at 44-55.

[16] *See 2002* ***Biennial Review*** *NPRM* (separate statement of Commission Kevin J. Martin).

[17] ***Fox Television Stations,*** *Inc.* ***v.*** *FCC,* 280 F.3d 1027, 1039 (D.C.Cir. 2002) ***("Fox Television"), rehearinggranted,*** 293 F.3d 537 (D.C. Cir. 2002).

Nothing prevents the Commission from deciding the fate of the Newspaper Rule separately, before the other rules in this *2002 Biennial Review*. For example, the Commission refrained from "breathing new life" into the local cable-broadcast cross-ownership rule after it was vacated by the appellate court," even though it did not rule out the possibility issues involving cable-broadcast cross-ownership would be addressed in the larger context of this proceeding.[19]

Inevitably, parties opposed to changing, primarily, **the** other non-newspaper ownership rules, will attempt to force the Commission to play by a timetable other than the Commission's. The Commission has already granted one extension of the deadlines for filing comments and replies in the omnibus review" and has indicated public hearings will be held in February 2003.[21] Both these actions call into question the ability of the Commission to adhere to its stated intention to issue the several decisions involved in this proceeding by Spring 2003.[22] It is likely that there may be further requests for extensions and various interim actions.[23]

These practical concerns, in addition to the fact the Newspaper Rule is in a different procedural posture from the other rules under review in the omnibus proceeding, warrant

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[18] *See id.*

[19] "FCC to Overhaul Broadcast Ownership Rules Adopted Decades Ago," *Warren's Cable Regulation Monitor,* September 23,2002.

[20] ***See*** *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the TelecommunicationsAct of 1996,* DA 02-2989 (released November 5,2002).

[21] *See "FCC Chairman Powell Announces Public Hearing in Richmond, VA on Media Ownership,* Public Notice (released December 4,2002).

[22] D. Ho, "Regulators to take a broad look at rules governing media ownership," Associated Press, June 17,2002.

[23] In addition to one public hearing set for Richmond, VA, Commissioner Copps believes additional hearings should be held around the country on various aspects of media ownership, which again would increase the likelihood of decisional delay. Commissioner Adelstein's recent arrival at the Commission thrusts him into the middle of several complex, high priority proceedings. Surely, the commissioners would more quickly come to agreement on the Newspaper Rule standing alone than they will on the many

separate review and action by the Commission. Since its adoption more than 27 years ago, no Commission has determined whether there continues to be any public interest justification for the Newspaper Rule. It has been six years since the Commission's repeated indications beginning in 1996 that it would undertake and complete just such a proceeding.[24] So, too, when the Commission issued its 2002 ***Biennial Review*** *NPRM* in this proceeding, Commissioner Martin observed, "We now have a full record on the extent to which the newspaper/broadcast rule should be retained, modified or eliminated, and we have had almost a year to review the record. Regardless of what the Commission concludes is the appropriate action to take, the affected parties deserved to be spared further delay in knowing that answer. I believe we could have concluded this proceeding by the end of the year [2002]."[25]

It is manifestly unfair to retain the Newspaper Rule, static for almost **28** years, while all around it swirls a dynamic media marketplace. In light of repeated failures by the Commission to take a hard look at the Rule, a Congressional presumption in favor of repeal, and court decisions vacating or remanding similar rules for lack of evidence and justification,[26] the Commission should repeal the Newspaper Rule immediately and independent of any other action.

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rules involved in the omnibus proceeding.

[24] In 1996, the Commission indicated it would "proceed expeditiously with an open proceeding to consider revising our newspaper broadcast cross-ownership policies." ***Capital Cities/ABC, Inc.***, 11 FCC Rcd 5841, 5851 (1996). In 1997, Commissioners Chong and Quello criticized the rule, calling for a reexamination of the rule that is "out-dated, over-regulatory, and all too often flies in the face of common sense." ***Stockholders of Renaissance Communications,*** 12 FCC Rcd 11866, 11894 (1997). In 2000, Commissioner Powell dissented from the Commission's decision to retain the Newspaper Rule and called for the Commission to undertake "a proceeding that would look critically at how the significant and far reaching changes in the video marketplace since 1975 have eviscerated the need for what is an extremely prohibitive regulation." *1998* ***Biennial Review Order,*** 15 FCC Rcd at 11157 (separate statement of Commissioner Michael Powell).

[25] *See* 2002 ***Biennial Review*** *NPRM* (separate statement of Commission Kevin J. Martin).

[26] *Fox* ***Television, supra*** n.17; ***Sinclair Broadcast Group, Inc. v. FCC,*** 284 F.3d 148 (D.C. Cir. 2002) ***("Sinclair")***

III. As a matter of law, the Rule should be repealed, applying any of the relevant analytical standards.

The Commission seeks comment on the appropriate standard of review to apply to its actions regarding ownership rules.[27] Congress has mandated the Commission repeal ownership rules no longer "necessary in the public interest." The judicial standard to be applied was clearly articulated by the court in *Fox Television* when it examined the national ownership cap and the cable-broadcast cross-ownership rules to judge "whether the Commission's determination was arbitrary and capricious or contrary to law, and whether the challenged rules violate the First Amendment."[28] Under any standard, however, the Rule fails.

A. The Newspaper Rule is not "necessary in the public interest" under Section 202(h) of the Telecommunications Act of 1996. Any action short of repeal would be arbitrary and capricious.

In 1996, Congress directed the Commission to review its ownership rules every two years to "determine whether any of such rules are necessary in the public interest as the result of competition."[29] Further, Congress required the Commission to "repeal or modify any regulation it determines to be no longer in the public interest."[30] Since the last round of comments on the Newspaper Rule, the ***Fox*** *Television* and *Sincluir* courts have provided guidance on what this standard means. The Newspaper Rule could not withstand judicial scrutiny under that standard, nor could it in any modified form, in light of these decisions and the absence of supporting evidence in the voluminous record despite months of study.

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[27] *2002 Biennial Review NPRM*, ¶ 18.
[28] ***Fox*** *Television, 280* F.3d at 1039.
[29] Telecommunications Act of **1996,** § 202(h) ("Biennial Review Standard).
[30] *Id.*

1. The Newspaper **Rule is** not "necessary **in the public** interest."

Applying the Biennial Review Standard, the ***Fox Television*** court remanded the national ownership cap[31] to the Commission for failing to justify it as "necessary in the public interest" and vacated the cable-broadcast cross-ownership rule[32] where it was unlikely the Commission would be able to justify retention of the rule on remand.[33] In its argument against the Commission's retention of the cable-broadcast rule, Time Warner recognized that the Commission had allowed common ownership of two television stations in a local market since 1999.[34] About a year later, the Commission determined it should retain the limitation cable-broadcast without any attempt to reconcile the difference in treatment.[35] In his separate statement in the *1998* ***Biennial Review Report,*** then-Commissioner Powell said, "we allow a single entity to own two broadcast stations in many markets, if enough 'voices' remain in the market. I do not see why newspaper/broadcast combinations could not be regulated the same way."[36] The ***Fox Television*** court said the Commission's diversity rationale for retaining the cable-broadcast rule was "woefully inadequate" because it failed to reconcile its relaxation of the duopoly rule with retention of the cross-ownership rule.[37] The Newspaper Rule is directly analogous to the cable-broadcast cross-ownership rule in that both were intended to promote diversity of voices by banning common ownership of two types of media in a local market.[38] Applying the ***Fox Television*** analysis to the Newspaper Rule, a reviewing court would demand a rock-solid justification for a cross-ownership rule that includes newspapers. The evidence does

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[31] 47 C.F.R. § 73.3555(e) (2001).
[32] 47 C.F.R. § 76.501(a) (2001).
[33] *Fox* ***Television,*** 280 F.3d at 1053.
[34] *See id.* at 1051.
[35] *1998 Biennial Review* ***Order,*** 15 FCC Rcd at 11 14-19.
[36] *Id.* at 11157.
[37] *Fox* ***Television,*** 280 F.3d at 1052.
[38] *FCC* ***v. National Citizens Committee for Broadcasting,*** 436 U.S. 775,786 (1978)("*NCCB*"); ***Fox***

not support such a justification, and, had the Newspaper Rule been before it, the *Fox Television* court would likely have vacated the Newspaper Rule as well.

a) The facts do not – and cannot – show that common ownership of newspapers and broadcast stations harms diversity.

The Biennial Review Standard requires a strong evidentiary showing for the Commission to retain or reformulate an ownership rule. The *Fox Television* court found the Commission had not shown "a substantial enough probability" a combined broadcast station-cable operator would discriminate against other broadcast stations in the local market "to deem reasonable a prophylactic rule as broad as the cross-ownership ban."[39] To show the Newspaper Rule is necessary to promote viewpoint diversity, *the Commission must be able to show commonly owned newspapers and broadcast stations significantly reduce viewpoint diversity.* The record does not – and can never - support this factual prerequisite because the facts show these combinations do not harm viewpoint diversity but, in fact, promote it.[40]

For example, the Pritchard study released in 2002 found no pattern of editorial slant among commonly-owned newspapers and television stations.[41] The study concluded that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in commonly owned outlets."[42] This study was preceded by another by the same author that found

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Television,280 F.3d at 1051-52.
[39] *Fox* ***Television,*** 280 F.3d at 1051.
[40] Tribune Comments 1998 at 59-71 ("[S]everal other factors wholly independent of ownership diversity are far more significant in determining whether a station will make new local news programming available to a market."); Tribune Comments 2001 at 44-53.
[41] *Supra,* note *14* ("[W]e found no generalized evidence of ownership manipulation of the news.").
[42] ***See id.***

a "wealth of 'diverse and antagonistic' information in situations of newspaper/broadcasting cross-ownership."[43]

Other studies commissioned by the Media Ownership Working Group examined the degree to which various media are substitutes for one another in the marketplace of ideas, i.e., the pursuit of viewpoint diversity, and in the advertising market, i.e., to promote economic competition.[44] These studies concluded various media including newspapers are, ***to some extent,*** substitutable for one another in both advertising and editorial content.[45] No further refinement of that conclusion has been made, and none may be possible.[46] An absolute, empirical measure of substitutability is impossible. While consumers may choose to watch television instead of reading a newspaper, there is no evidence to suggest they do so because of the viewpoint presented on either.

In addition, the comparison of content is highly subjective, even when comparing the same type of media.[47] A human being must read (or listen to, or view) the content under study and then make judgments about the "point of view" or "bias" or "slant" of the material. These variables can be very nuanced and subject to personal interpretations – for example, does the same story from Associated Press show a different point of view when published in two different

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[43] Pritchard, David, *A **Tale of Three Cities: 'Diverse and Antagonist' Information in Situations of Local Newspaper/Broadcast Cross-Ownership,*** 54 Fed. Comm. L.J. 31, 49 (Dec. 2001).

[44] Bush, Anthony, On the Substitutability of Local Newspaper, Radio, and Television Advertising in Local Business Sales (FCC Media Ownership Working Group Report #10).

[45] The most specific study was done by Nielsen Media Research which quantified the usage patterns among its sample group. This study was limited to a specific moment in time and, without a benchmark, is not sufficient. Nielsen Media Research, Consumer Survey on Media Usage (FCC Media Ownership Working Group Report #11).

[46] Tribune Comments 2001, at 72-77.

[47] ***See,*** *e.g.,* Pritchard studies, ***supra*** note 14. In addition, patterns of usage are constantly evolving. In asking a predictive question about future use of various media, the Nielsen study did not distinguish between "local" and "national" news – a critical distinction in assembling empirical evidence that might be used to support a *local* Newspaper Rule.

newspapers with two different headlines? Or when placed on page one as opposed to the back page of the second section? Consider a story on the Enron scandal – how should one compare its content when the story is written for the business audience of The Wall Street Journal or CNBC as opposed to the general public that would read **USA** Today or watch *60* Minutes? When comparing content across ***different*** media, additional variables must be considered. These include the difference in impact of a visual, aural, or text message; the depth of coverage (all of the words in a typical half-hour newscast could fit on less than one page of newsprint); the power of personalities and columnists delivering news and other content in television, radio, and text; and the frequency and repetition of the content (24-hour cable news services, online newsletters and automatic email updates compared to daily newspapers or infrequent broadcast newscasts). These illustrations underscore the inevitable conclusion people use various media *to some* ***degree*** as substitutes but quantifying or refining that substitutability to a more precise level (e.g., close substitutes, loose substitutes) is not possible when it comes to viewpoints.[48]

Moreover, the evidence shows the public substitutes media based on the choice to read, watch or listen, and not on the content. That is, people choose to get news or information from television, radio or newspapers based most often on which medium is most convenient for them. Thus, allowing newspapers to speak in a broadcast environment does not limit the number of voices but adds to it. It permits **a** new voice to use the broadcast media – a voice to which many television viewers and radio listeners do not have access today.

If the Commission were to attempt to take action short of repealing the Newspaper Rule, it would face an even harder evidentiary task of deciding where to draw a line. There is no evidence to support limiting some, but not all, common ownership of newspapers and broadcast

[48] See also discussion *infra,* at 29-31

stations. Furthermore, there is no evidence in any earlier record on the Newspaper Rule or in the Media Ownership Working Group studies to support, for example, a rule applicable only to newspapers and either television or radio stations; to newspapers and broadcast stations in just the smaller markets; or to newspapers with television duopolies that are otherwise permitted. This evidentiary problem will also make it unrealistic for the Commission to try to adopt a unified local ownership rule. The data will not help the Commission decide an entity should be able to own any particular number of newspapers and broadcast stations in a local market because it is simply not quantifiable to the level of refinement the courts require based on the *Fox Television* and *Sincluir* decisions. A reviewing court surely will look for substantial justification that a rule is "necessary in the public interest" if newspapers are included in any reformulated cross-ownership rule. Such justification does not exist in the previous record or the new studies

b) The presumption of repeal makes the standard of proof more exacting.

The Court of Appeals for the District of Columbia Circuit stated the Biennial Review Standard "carries with it a presumption in favor of repealing or modifying [its] ownership rules."[49] Chairman Powell understands that "the clear bent of the biennial review process set out by Congress is deregulatory. . .I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity."[50] Chairman Powell also testified before a Congressional subcommittee that "the D.C. Circuit's recent decision [in *Fox Television]* found that the Act compels the Commission to review the full panoply of media ownership regulations every two years and to repeal these regulations unless the Commission

[49] *Fox Television,* 280 F.3d at 1048.
[50] *1998 Biennial Review Order,* 15 FCC Rcd at 11151 (separate statement of Commissioner Powell).

makes an affirmative finding that the rules are necessary to serve the public interest."[51] A few weeks later, the reviewing court in *Sincluir* noted the Biennial Review standard was "designed to continue the process of deregulation"[52] and remanded the Commission's reformulation of the local television rule.[53] Clearly the Biennial Review Standard carries with it a presumption in favor of repeal unless sufficient evidence is documented and relied upon by the Commission to retain or reformulate an ownership rule.

The deregulatory presumption must be overcome to retain a Newspaper Rule in original or modified form. In ***Sincluir,*** the Commission argued that absent "definitive empirical studies quantifying the extent to which the various media are substitutable in local markets," there were "unresolved questions on substitutability" that justified retention of the local television rule.[54] The Court found "[t]his 'wait-and-see approach, however, cannot be squared with its statutory mandate . . . to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[55] With respect to the Newspaper Rule, no definitive empirical studies have been produced or submitted to support retention of the Rule in any form. Those objecting to relaxation or repeal of the Newspaper Rule have provided limited data that are not definitive and could not be characterized as "substantial evidence" demonstrating the need for the Newspaper Rule.[56] The presumption of deregulation in the Biennial Review Standard will not permit the Commission to retain the Newspaper Rule or to try out a new form of cross-ownership limitation, given what is in the record.

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[51] Testimony of Chairman Michael K. Powell before the Subcommittee on Commerce, Justice, State, and the Judiciary of the Committee on Appropriations, United States Senate, March 7, 2002.
[52] ***Sinclair,*** 284 F.3d at 159 (internal citation omitted).
[53] ***See id.***
[54] ***See id.*** at 164 (internal quotations omitted).
[55] ***See id.*** at 171, *citing Fox* ***Television,*** 280 F.3d at 1042.
[56] Tribune Reply Comments 2002 at 5-10.

c) The Commission must weigh the substantial harm of retaining the Newspaper Rule against any presumed benefit.

Even if it were somehow convinced of a need to regulate, the Commission must consider countervailing harms. When the Supreme Court reviewed the Commission's adoption of the Newspaper Rule, it simply commented "given the absence of persuasive countervailing considerations, 'even a small gain in diversity' was 'worth pursuing.'"[57] After 27 years, the countervailing harms, however, are considerable.

Most significantly, the Newspaper Rule harms the public by denying access to the superior quality news and information that results when publishers own local broadcast outlets. Even in 1975, the Commission acknowledged local newspaper-broadcast combinations provided more and better news and public affairs programming than independent affiliates.[58] As pointed out by Tribune, common ownership spurs broader local television news coverage over the air, fosters minority and alternative interest coverage in both print and broadcast, and has prompted the development of local all-news cable channels such as ChicagoLand Television News.[59] The Commission's own studies confirm the public interest advantages of commonly-owned newspapers and television stations, including the presence of additional, high-quality news and public affairs programming.[60] In light of these serious harms, the Commission should repeal the Newspaper Rule and refrain from including newspapers in any new limitation on local media ownership.

Moreover, the Newspaper Rule discriminates against newspapers by singling them out for this total proscription on local broadcast ownership. By contrast, the rules limiting ownership

[57] *NCCB*, 436 U S . at 786 (internal citations omitted).
[58] ***See id.*** at 807.
[59] Tribune Reply Comments 2002 at 15-16; Tribune Comments 2001 at 44-55

of cable systems, radio stations, and television stations all have been repealed, vacated by the courts or substantially relaxed. This discriminatory treatment disregards the First Amendment and involves the Commission in regulating newspapers, which is beyond the scope of its statutory authority.[61]

The Newspaper Rule has also skewed the broadcast ownership market by precluding newspapers from bidding for local broadcast stations. In contrast to the *NCCB* decision that enactment of a prospective ownership limit was not unreasonable,[62] the ***Fox Television*** decision to vacate the cable-broadcast rule was based, in part, on the harmful effect on cable operators caused by retention of the rule pending a remand.[63] Thus far, the Commission has failed to consider this important aspect of the Newspaper Rule.

2. The Newspaper Rule is not "in the public interest in light of competition."

The Biennial Review Standard also requires the Commission to repeal or modify any ownership rule not in the public interest "in light of competition." The Commission, upon review of the substantial evidentiary record on the Newspaper Rule compiled previously, in concert with the Media Ownership Working Group studies, will find ample evidence that the current level of competition among local media is adequate to assure the kind of viewpoint diversity that has been the stated purpose of the Newspaper Rule.[64] For example, the study by

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[60] ***Supra,*** note 10.
[61] Tribune Comments 2001 at 68-69. The Supreme Court in ***NCCB*** pointed out that newspapers were treated "in essentially the same fashion of other owners of the major media of mass communications." *NCCB,* 436 U.S. at 801. This may have been true in 1975 but has not been the case since the mid-1980s. *See also* 1998 ***Biennial Review*** *NPRM,* 15 FCC Rcd at 11154 (separate statement **of** Commissioner Michael Powell, "This rule raises significant First Amendment concerns. . .").
[62] *NCCB*, 436 U.S. at 811.
[63] ***Fox Television,*** 280 F.3d at 1039.
[64] ***See*** Levy, Jonathan, et. al., Broadcast Television: Survivor in a Sea of Competition; ***see also*** Roberts, Scott, et. al., **A** Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)(FCC Media Ownership Working Group Report #12); *1998* ***Biennial Review Order,*** 15 FCC Rcd at

the Commission's Office of Plans and Policy finds "an increasingly competitive environment for television broadcasting,. . . continuing audience fragmentation and further pressure on broadcast advertising revenues" due to the emergence and growth of the cable and satellite industries.[65] As pointed out previously by Tribune, the marketplace can and does assure every American has a plethora of choices – many would say an excess of choices – for their news and information.[66] The ***Fox Television*** court chastised the Commission for deciding to retain the cable-broadcast cross-ownership rule without considering the increase in the number of competing television stations since it promulgated the rule in 1970, saying "it is hard to imagine anything more relevant to the question whether the [r]ule is still necessary to further diversity."[67] Tribune has previously explained how "the market – not proscriptive regulation – is the best guarantor of viewpoint diversity"[68] and "common ownership does not mean common viewpoints."[69] The explosion in competitive media offerings in the last 25 years has extinguished any need for an industrial policy that bars certain companies from competing to offer news and information to the public, all in the name of "viewpoint diversity." As Chairman Powell stated in describing how the growth in media and technology has affected the goal of diversity:

> "Different owners may have different perspectives, but they probably have more in common as commercial interests than not, for each must compete for maximum audience share to remain profitable. . . Controversy and conflict are the stuff of good story. If different viewpoints are to be found, I think they will be the products of the commercial market much more than by our rules and our adherence to the high-brow ideal we used to defend them."[70]

11146-50 (separate statement of Commissioner Michael Powell).

[65] ***See id.***

[66] ***See*** Tribune Comments 2001 at 7-37; Tribune Comments 1998 at 22-51.

[67] ***Fox Television,*** 280 F.3d at 1052.

[68] Tribune Comments 2001 at 40.

[69] *Id.* at 42-43, fn. 173 ("[D]ecisions about content at Tribune media are all made locally and Tribune media routinely criticize their sister operations and their corporate parent.").

[70] *1998 **Biennial Review Order,*** 15 FCC Rcd at 11149-50 (separate statement of Commissioner Michael

It is important to note that once the Newspaper Rule is repealed, antitrust laws will still exist to prevent any anticompetitive combinations and curb any abuses that might arise. Most acquisitions of media properties still will be subject to review by the Department of Justice and/or the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act.[71] Public and private actions under federal and state antitrust laws can be brought to prevent anticompetitive combinations from being formed or to restrain or punish anticompetitive behavior. The Commission also is bound to review transactions involving broadcast licenses and may use that oversight to review the competitive conditions of the markets involved.[72]

B. The Newspaper **Rule** is unconstitutional under any level **of** scrutiny.

As the Commission noted in the 2002 ***Biennial Review*** *NPRM*, to survive judicial scrutiny any ownership rule must be consistent with the First Amendment.[73] In determining which of three levels of Constitutional scrutiny to apply, Tribune has consistently argued the Newspaper Rule should be subject to strict scrutiny because of its discriminatory impact on newspaper publishers, the content-based nature of the regulation, and because the scarcity rationale is no longer valid and thus cannot be invoked to exempt the Newspaper Rule from the Constitutional standard of strict scrutiny.[74] As described below, at least four justices of the Supreme Court also understand ownership rules to be "content-based" and therefore, subject to strict scrutiny.

Powell).
[71] 15 U.S.C. § 18a (2001).
[72] 47 **U.S.C.** § 310(d) (2001).
[73] ***See*** 2002 ***Biennial Review*** *NPRM*, ¶ 20.
[74] Tribune Comments 2001 at 58-69: Tribune Comments 1998 at 4-15

Even under the least restrictive Constitutional standard, however, the Newspaper Rule fails. The "rational basis" test examines whether a rule is a "reasonable means of promoting the public interest in diversified mass communications."[75] This standard was applied by both the *Fox Television* and *Sinclair* courts.[76]

1. Strict scrutiny should apply to the Newspaper Rule because ownership rules have as their goal diversity and/or localism and are therefore content-based, and because the scarcity rationale no longer justifies more relaxed treatment.

The Newspaper Rule, by singling out newspapers as a category of speakers not permitted to own broadcast stations where they publish newspapers, should be considered a "content-related" rule for analysis under the First Amendment. In urging that the Commission's must-carry rules are content-related, in *Turner I* Justice O'Connor, joined in dissent by Justices Scalia, Ginsburg, and Thomas, vigorously argued that the cable carriage rules should be subject to strict scrutiny, saying "[t]he interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say."" Where a rule is premised on diversity, the rule, being content-based, must be subject to strict scrutiny – that is, it must be "narrowly tailored to a compelling state interest."[78] The dissenting justices argue that neither localism nor diversity of viewpoints is "compelling" for purposes of the compelling state interest test.[79]

Writing for the majority in *Turner I*, Justice Kennedy analyzed whether the must-carry rules are content-based and therefore subject to strict scrutiny, noting "[o]ur cases have

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[75] *NCCB*, 436 U.S. at 802.
[76] *See Fox Television*, 280 F.3d at 1046-47; *Sinclair*, 284 F.3d at 167-8.
[77] *Turner Broad. System, Inc. v. FCC*, 512 U.S. at 622,678 (1994)("*Turner I*")
[78] *See id.* at 680, *citing Boos v. Barry*, 485 U S . 312,321 (1988).
[79] *See id.*

recognized that even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys."" He stated the Congressional objective in enacting the must-carry rule was "not to favor programming of a particular subject matter, viewpoint, or format . . ."[81] On this point, however, Justices O'Connor, Scalia, Ginsburg, and Thomas disagreed, saying the Court "is mistaken in concluding that the interest in diversity – in 'access to a multiplicity' of 'diverse and antagonistic sources' – is content-neutral."[82] By the dissent's analysis, the Newspaper Rule fails because the cross-ownership ban prefers "non-newspapers" as broadcast licensees. Despite the purported content-neutral Congressional justification that must-carry was needed to protect the competitive position of broadcasters, these justices saw it as an impermissible preference for non-cable speakers. The Newspaper Rule is even more egregious and content-based than the must-carry rules because the very reason for the Newspaper Rule is to protect against the same viewpoint, the same message, the same content, being expressed in two local media. Unlike the must-carry rule which sought to promote diversity by *forcing* speech, the Newspaper Rule perversely seeks to promote diversity by censoring it – by stopping a newspaper from speaking on commonly owned radio or television stations in local markets. Taking into account Justice Kennedy's analysis with the vigorous dissent of the four justices, it is quite possible that a majority of justices today would conclude that any Newspaper Rule is unconstitutional.

Historically, this invasive government regulation of broadcast media that unquestionably would violate the First Amendment were it applied to print media, cable television, or the Internet, has been justified on the grounds that the spectrum cannot accommodate all those who

[80] *Turner I,* 512 U.S. at 645
[81] *Id.* at 646.
[82] *Id.* at 678.

want to use it and government may adopt regulations to increase diversity among broadcasters.[83] Subsequent decisions of the Supreme Court confirm rules that otherwise would fail First Amendment scrutiny could be upheld because of any media scarcity that existed 25 years ago.[84] But since *Red Lion* and *NCCB*, reviewing courts have stated their willingness to reconsider the scarcity doctrine in light of technological change. The Supreme Court stated its willingness to reconsider *Red Lion* with "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulations may be required."[85] Judge Sentelle recently wrote "perhaps with now-Chairman Powell's announcement that the 'time has come to reexamine First Amendment jurisprudence as it has been applied to broadcast media and bring it into line with the realities of today's communications marketplace,' the Supreme Court will take notice."[86]

2. At a minimum, the Newspaper Rule should be measured against the *O'Brien* intermediate scrutiny test, against which it fails.

The standard applied in *NCCB* was based on the perception there was scarcity in the broadcast media and the rules were not content related.[87] The *NCCB* court, without probing the issue, simply asserted "the purpose and effect [of the Newspaper Rule] is to promote free speech, not to restrict it."[88] Contrary to the Court's idealized view, however, the *effect* of the rule has been to restrict speech. As discussed below, courts have acknowledged that ownership

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[83] *Red Lion Broad. Co. v. FCC,* 395 U.S. 367 (1969).
[84] *Turner I,* 512 U.S. at 639; *see also Metro Broad. Inc., v. FCC,* 491 U.S. 547, 566-67 (1990), *overruled on other grounds, Adarand Constr., Inc. v. Pena,* 515 U.S. *200* (1995).
[85] *FCC v. League of Women Voters,* 468 U.S. 364, 376-77, n. 11 (1984); *see also Arkansas AFL-CIO v. FCC,* 11 F.3d 1430, 1443 (8" Cir. 1993) (Arnold, J. concurring) (developments since *RedLion* 'raise a significant possibility that the First Amendment balance struck in *RedLion* would look different today").
[86] *Sinclair,* 284 F.3d at 172, quoting Commissioner Powell, *Willful Denial and First Amendment Jurisprudence,* Remarks before the Media Institute, Washington DC (Apr. 22, 1998).
[87] *RedLion Broad. Co. v. FCC,* 395 U.S. 367 (1969); *see also Turner I,* 512 U.S. at 622 (essential to the *Red Lion* doctrine are the "special physical characteristics of broadcast transmission"); *FCC v. League of Women Voters,* 468 U.S. 364, 377 (1984); *Metro Broad. Inc. v. FCC,* 491 U.S. 541, 566-61 (1990).